United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4075

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4075

SO CHAN,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

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PETITION FOR REVIEW OF AN ORDER OF THE BOARD IMMIGRATION APPEALS

RESPONDENT'S BRIEF

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105(a), So Chan petitions this Court for review of an order denying his application for suspension of deportation entered by the Board of Immigration Appeals (the "Board") on February 5, 1976. That order dismissed the petitioner's appeal from the order and decision of an Immigration Judge denying the alien's application for suspension of deportation under Section 244(e) of the Act, 8 U.S.C. § 1254(e).

The petitioner contends that the Board's order should be set aside because the denial of his application for suspension of deportation was arbitrary and an abuse of discretion. This petition, seeking review of the Board's order, was filed on March 16, 1976. Since the date of filing this petition the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act.

Statement of the Facts

The petitioner is a 60 year old alien, a native of China and a citizen of the Republic of China on Taiwan. He entered the United States as a nonimmigrant crewman on or about August 24, 1962, authorized to remain in this country for the period of time his vessel remained in port, not exceeding 29 days. At a deportation hearing held on October 2, 1964 he was found deportable as an overstay crewman and granted the privilege of voluntary departure within the time fixed by the District Director with an alternate provision for deportation to Hong Kong upon his failure to depart when and as required. Pursuant to this order he was given to June 10, 1966 to depart voluntarily and upon his failure to do so a warrant of deportation was entered on August 5, 1966. Furthermore, petitioner failed to surrender for deportation on May 18, 1967 as required by the Service.

Petitioner managed to evade apprehension by the Service until July 1, 1975. On that date petitioner submitted a motion to reopen his deportation proceedings to afford him the opportunity to apply for adjustment of status under the provisions of Section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1). The motion to reopen was granted by an order of the Immigration Judge dated July 3, 1975.

After a reopened deportation hearing held on July 18, 1975 the Immigration Judge entered a decision and order dated September 8, 1975 denying the petitioner's application for suspension of deportation as a matter of discretion. On September 17, 1975 petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals. On February 5, 1976 the Board affirmed the decision of the Immigration Judge and dismissed petitioner's appeal.

Relevant Statute

Immigration and Nationality Act, 63 Stat. 163 (1952), as amended:

Section 244, 8 U.S.C. § 1254—

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * * *

ARGUMENT

The Board of Immigration Appeals did not abuse its discretionary authority in denying petitioner's application for suspension of deportation.

A. Suspension of deportation.

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. § 1254(a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. § 1254(c); *McGrath* v. *Kristensen*, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.

The applicant for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. § 242.17(d); *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960), *rehearing denied*, 364 U.S. 854; *Brownell* v.

Cohen, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. *Hintopoulos* v. *Shaughnessy, supra; Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ng* v. *Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860. Accordingly, when making his application for suspension of deportation it was incumbent upon this petitioner to offer evidence to show not only that he was statutorily eligible but that he merited the extraordinary relief as a matter of discretion.

B. The Board properly exercised its discretion in denying petitioner's application for suspension of deportation.

In support of his application for suspension of deportation, the alien established that he had been physically present in the United States for over seven years and that deportation would be an extreme hardship to himself because of his prolonged residence in the United States; his anticipated difficulty in obtaining employment in Taiwan or Hong Kong; the fact that he has invested $8,000 in the restaurant at which he is employed; and the fact that his wife and two children are now in the United States. These items would tend to establish statutory eligibility.

There was, however, evidence in the record to show that the petitioner did not merit the favorable exercise of discretion. The record indicated that this alien, who has been subject to a deportation order since 1964, managed

to accumulate his seven years physical presence by knowingly and wilfully failing to surrender for deportation when directed to do so and by resorting to tactics designed to evade apprehension by the Service. Specifically, the alien admitted that he failed to file the required annual address report, that he had changed his place of employment when he learned that the Service was looking for him, and that he used a mailing address in New York but actually lived at his place of employment in New Jersey.

Furthermore, the record establishes, and the alien concedes, that his wife and daughter are presently subject to final orders of deportation while his son was admitted to the United States on a student visa which apparently expires in June 1976.

We submit that the Board's decision was well-grounded. The fact that the alien has resorted to dilatory tactics to extend a concededly illegal stay is a reasonable ground for the withholding of discretionary relief. *Goon Ming Wah* v. *Immigration and Naturalization Service*, 368 F.2d 292 (1st Cir. 1967); *Jiminez* v. *Barber*, 252 F.2d 550 (7th Cir. 1968). This doctrine is particularly true in this area where the favorable exercise of discretion is purely a matter of administrative grace. Cf. *Fan Wan Keung* v. *Immigration and Naturalization Service*, 434 F.2d 301 (2d Cir. 1970); *United States ex rel. Lee Pao Fen* v. *Esperdy*, 423 F.2d 6 (2d Cir. 1970); *Lam Tat Sin* v. *Esperdy*, 334 F.2d 999 (2d Cir. 1964), *cert. denied*, 379 U.S. 901.

Congress has clearly indicated its disapproval of granting this extraordinary type of relief to aliens with histories similar to this petitioner's. In commenting upon the relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a), the Committee

on the Judiciary strongly expressed its displeasure with private legislation and frivolous judicial actions brought by aliens to prevent or delay their deportation. See House Report No. 1167, 89th Cong., 1st Sess., October 14, 1965. Of course the Board, when making decisions, may properly take into account the Congressional policy underlying the statute involved. See *Hintopoulos* v. *Shaughnessy*, *supra*. This is particularly true where Congress has retained a veto power over all approved applications for suspension of deportation.

We submit that the Board's decision was well supported by the record, which is virtually barren of any outstanding equity in favor of the petitioner. Indeed, by his own admission, the only possible hardship which deportation might entail involves his economic well-being. However, the Courts have consistently held that economic detriment alone is not a sufficient basis on which to qualify for relief under Section 244 of the Act, 8 U.S.C. § 1254. *Kwang Shick Myung* v. *Immigration and Naturalization Service*, 368 F.2d 330 (7th Cir. 1966); *Kasravi* v. *Immigration and Naturalization Service*, 388 F.2d 68 (9th Cir. 1968); *Lacer* v. *Immigration and Naturalization Service*, 388 F.2d 68 (9th Cir. 1968); *Yuing Ying Cheung* v. *Immigration and Naturalization Service*, 422 F.2d 43 (3d Cir. 1970).

C. Scope of review.

The only issue presented in this petition for review is whether or not the Board abused its discretionary authority in denying the petitioner's application for suspension of deportation. The Supreme Court has declared that the approval of suspension of deportation is confided to the "unfettered discretion" of the Attorney General, *Jay* v. *Boyd*, 351 U.S. 345, 354, 357 (1956). The

scope of judicial review is very narrow and the Board's discretionary determination should not be disturbed unless it is shown to be clearly arbitrary. *Hintopoulos* v. *Shaughnessy, supra; Wong Wing Hang* v. *Immigration and Naturalization Service, supra.* Where, as here, the record established that the alien had managed to accumulate his seven years physical presence by intentionally evading apprehension and by concealing his whereabouts from the Service, and the record further established that the alien had failed to establish any equities which would show that he merited the favorable exercise of discretion, the denial of petitioner's application for suspension of deportation was not an abuse of discretion.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-4075

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 7th day of June, 1976 she served two copies of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Barst and Mukamal
127 John Street
New York, New York 10038

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this 7th day of June, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977